

No. 10445.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

BENJAMIN ROSE and LOUIS VITAGLIANO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF JURISDICTION.

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A.

Jurisdiction is sustained in this case by reason of Title 28, Section 225, U. S. Codes.

B.

Questions Raised by This Appeal.

1. Does an indictment charge the offense of conspiracy under Title 18, Section 88, to violate the Second War Powers Act approved March 27, 1942, where the statute was approved March 27, 1942, and the conspiracy is alleged to have occurred on or about December 12, 1941?

2. Does an indictment charge an offense against the laws of the United States where it charges violation of the statute, executive orders, regulations and directives hereinbefore referred to [R. 78] without setting forth

the forbidden part of the statute or the executive orders, regulations or directives alleged to have been violated?

3. Where a statute is so vague, indefinite and uncertain as not to specify the conduct which is forbidden or allowed, can that statute be supplemented by regulations? Can a crime be established by regulations or does this constitute an unconstitutional assumption by the executive department of the functions of Congress?

4. Where a regulation provides that it shall apply to certain persons and not to other persons, does the indictment which fails to set out whether or not the regulation is or is not applicable, state an offense against the laws of the United States?

5. Can an indictment merely refer to statutes or regulations by reference and still constitute an offense against the laws of the United States?

6. Where acts are charged against dealers in rubber tires who were permitted by law to deal with each other, would an indictment state an offense against the laws of the United States which did not show clearly that the dealers' conduct was clearly not within the provisions of the regulation?

7. Where a statute, to-wit, the Second War Powers Act, fixes no penalty for a violation of a regulation, does it constitute an offense against the laws of the United States?

8. Should the court have directed the verdict in behalf of the defense in view of the fact that all of the evidence shows transactions between dealers, one with each other except one single transaction which was had by one person as an individual with one other person?

9. Should the court have struck irrelevant testimony set out in the motions to strike?

10. Should the court have granted the motions and arrested judgment on the grounds that the indictment is too vague, indefinite and uncertain as to the nature and cause of the accusations (2) on the ground that evidence illegally seized was used in evidence in violation of the Fourth and Fifth Amendments to the Constitution of the United States; (3) that the evidence does not support a conviction to commit offense against the United States?

C.

Statutes Involved.

Subsection (a) of Section 2 of Title III of Public Law 507, 77th Congress, approved March 27th, 1942, and commonly known as the Second War Powers Act

TITLE III—PRIORITIES POWERS

Sec. 301. Subsection (a) of section 2 of the Act of June 28, 1940 (54 Stat. 676), entitled "An Act to expedite national defense, and for other purposes," as amended by the Act of May 31, 1941 (Public Law Numbered 89, Seventy-seventh Congress), is hereby amended to read as follows:

"Sec. 2. (a) (1) That whenever deemed by the President of the United States to be in the best interests of the national defense during the national emergency declared by the President on September 8, 1939, to exist, the Secretary of the Navy is hereby authorized to negotiate contracts for the acquisition, construction, repair, or alteration of complete naval vessels or aircraft, or any portion thereof, including plans, spare parts, and equipment therefor, that have been or may be authorized, and also for machine tools

and other similar equipment, with or without advertising or competitive bidding upon determination that the price is fair and reasonable. Deliveries of material under all orders placed pursuant to the authority of this paragraph and all other naval contracts or orders and deliveries of material under all Army contracts or orders shall, in the discretion of the President, take priority over all deliveries for private account or for export: *Provided*, That the Secretary of the Navy shall report every three months to the Congress the contracts entered into under the authority of this paragraph: *Provided further*, That contracts negotiated pursuant to the provisions of this paragraph shall not be deemed to be contracts for the purchase of such materials, supplies, articles, or equipment as may usually be bought in the open market within the meaning of section 9 of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes,' approved June 30, 1936 (49 Stat. 2036; U. S. C., Supp. V, title 41, secs. 35-45): *Provided further*, That nothing herein contained shall relieve a bidder or contractor of the obligation to furnish the bonds under the requirements of the Act of August 24, 1935 (49 Stat. 793; 40 U. S. C. 270 (a) to (d)): *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under the authority granted by this paragraph to negotiate contracts; but this proviso shall not be construed to prohibit the use of the cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of the Navy: *And provided further*, That the fixed fee to be paid the contractor as a result of any contract entered into under the authority of this paragraph, or any War Department contract entered into in the form of cost-

plus-a-fixed-fee, shall not exceed 7 per centum of the estimated cost of the contract (exclusive of the fee as determined by the Secretary of the Navy or the Secretary of War, as the case may be).

“(2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

“(A) Contracts or orders for the government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled ‘An Act to promote the defense of the United States’;

“(B) Contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States;

“(C) Subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this subsection (a).

Deliveries under any contract or order specified in this subsection (a) may be assigned priority over deliveries under any other contract or order; and the President may require acceptance of and performance under such contracts or orders in preference to other contracts or orders for the purpose of assuring such priority. Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon

such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

“(3) The President shall be entitled to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, any person (which, for the purpose of this subsection (a), shall include any individual, partnership, association, business trust, corporation, or any organized group of persons, whether incorporated or not), and make such investigations, as may be necessary or appropriate, in his discretion, to the enforcement or administration of the provisions of this subsection (a).

“(4) For the purpose of obtaining any information, verifying any report required, or making any investigation pursuant to paragraph (3), the President may administer oaths and affirmations, and may require by subpoena or otherwise the attendance and testimony of witnesses and the production of any books or records or any other documentary or physical evidence which may be relevant to the inquiry. Such attendance and testimony of witnesses and the production of such books, records, or other documentary or physical evidence may be required at any designated place from any State, Territory, or other place subject to the jurisdiction of the United States: *Provided*, That the production of a person's books, records, or other documentary evidence shall not be required at any place other than the place where such person resides or transacts business, if, prior to the return date specified in the subpoena issued with respect thereto, such person furnishes the President with a true copy of such books, records, or other docu-

mentary evidence (certified by such person under oath to be a true and correct copy) or enters into a stipulation with the President as to the information contained in such books, records, or other documentary evidence. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpoena, or in any action or proceeding which may be instituted under this subsection (a), on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be subject to prosecution and punishment or to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that any such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. The President shall not publish or disclose any information obtained under this paragraph which the President deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the President determines that the withholding thereof is contrary to the interest of the national defense and security; and anyone violating this provision shall be guilty of a felony and upon conviction thereof shall be fined not exceeding \$1,000, or be imprisoned not exceeding two years, or both.

“(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act re-

quired by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

“(6) The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States and the courts of the Philippine Islands shall have jurisdiction of violations of this subsection (a) or any rule, regulation, or order or subpoena thereunder, whether heretofore or hereafter issued, and of all civil actions under this subsection (a) to enforce any liability or duty created by, or to enjoin any violation of, this subsection (a) or any rule, regulation, order, or subpoena thereunder whether heretofore or hereafter issued. Any criminal proceedings on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil, may be served in any district wherein the defendant resides or transacts business or whenever the defendant may be found; and subpoena for witnesses who are required to attend a court in any district in any such case may run into any other district. No costs shall be assessed against the United States in any proceeding under this subsection (a).

“(7) No person shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from compliance with this subsection (a) or any rule, regulation,

or order issued thereunder, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid.

“(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.”*

Title 18, U. S. C., Section 88, as follows: Amendment No. 1 to Supplementary Order No. M-15-B to Restrict the Use of Rubber.

Statutes Believed to Support Jurisdiction.

Title 28, Section 225.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellants.

*Appellant has sent to Washington to get copies of the various regulations and statutes referred to in the indictment (pp. 73-81) but has been unable to get copies of them except the Second War Powers Act. It is assumed that the Government will be able to supply the missing statutes and regulations for the Court.

